

Equal opportunities between men and women and gender mainstreaming under the European Employment Strategy (EES) and the Open Method of Coordination (OMC): a new policy approach to combat gender discrimination?

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Equal Opportunities between Men and Women and Gender Mainstreaming under the European Employment Strategy (EES) and the Open Method of Coordination (OMC) – A New Policy Approach to Combat Gender Discrimination?

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Abstract

The aim of this article is to analyse the development of the concepts of equal opportunities between men and women and gender mainstreaming with regard to a new policy approach taken outside the traditional community method and to raise the question to what extent these policy instruments can be considered as a "new tool" to combat gender discrimination. The European Employment Strategy (EES) and the Open Method of Coordination (OMC) are two examples of an instrument outside the community method, which tries to increase the recognition of the gender dimension of the labour market and to improve the initiatives taken in the interrelated field of social inclusion of women by the use of "soft" policy instruments and voluntarist procedures. The paper illustrates the development of the concept of equal opportunities between men and women and gender mainstreaming under the EES and the OMC; more precisely, the paper seeks to demonstrate that the concepts of equal opportunities between men and women and gender mainstreaming cannot be addressed by reference to harmonisation instruments exclusively, but need, due to the diverse approach towards gender equality on a national level, a decentralised approach as it is offered by the coordination instrument, which should be understood as a complementary tool of integration.

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1. Introduction

The concept of equal opportunities between men and women has for a long time been developed by reference to instruments under the so-called “community method” (Bell, 2002:32).⁽¹⁾ Starting from the principle of equal pay for men and women as already enshrined in Art. 119 (now Art. 141) of the Treaty establishing the European Economic Community (EEC), the concept of non-discrimination between men and women had continuously been

expanded by the jurisdiction of the European Court of Justice (ECJ).⁽²⁾ With the introduction of Art. 13 EC by the Treaty of Amsterdam, the European Community (EC) was enabled, although within the limits of powers conferred upon it by the EC treaty, to combat forms of discrimination, against which legal protection was hitherto not available on the Community level, such as discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁽³⁾

But even if the concept of equal opportunities between men and women was subject to such a continuous expansion under EC law, the question has to be raised how successful the European law approach had been. In a practical context, the issue of gender equality is still on the political agenda and the aim of equal opportunities between men and women far from being achieved (Masselot, 2007:152). What is wrong with the described approach of the EC? Are the chosen instruments the wrong ones or is it the subject matter of equality issues which can only to limited extent be made subject to legal treatment? Presumably, there is some truth in both issues.

The point this paper wants to make is thus to look what contribution the soft policy tool of coordination could make to the general aim of gender equality. Therefore the paper looks within its first part at the development of gender equality issues and the concept of gender mainstreaming under the European Employment Strategy (EES) and the Open Method of Coordination (OMC). Whereas the traditional legal approach to gender equality issues is limited to the field of labour law, i.e. to the regulation of the employer-employee-relationship⁽⁴⁾, the coordination instrument expands the general aim of gender equality to the areas of labour market and social policies and thus to areas which are not part of the Community's legislative competences (Rubery, 2002:500). The second part of the paper analyses more generally the strengths and weaknesses of such a soft policy approach towards gender equality and points especially at the ambiguous relationship between traditional legal instruments under the Community method and the coordination instrument. Even though the field of gender equality has shown that a complementary rather than a supplementary use of New Modes of Governance is possible, there is nevertheless a certain danger that traditional legal concepts are undermined. The latter issue is of special concern in view of emerging, so-called hybrid forms combining hard law and soft policy elements - an issue the third and last part of the paper will deal with in view of the Race Equality Directive 2000/43/EC⁽⁵⁾ as a further area of anti-discrimination policy where new modes of governance have been used.

The overall aim of the paper is thus a twofold one: On the one hand, it aims to stress that an effective approach to gender equality cannot be achieved with reference to the traditional Community method only, simply because the EC does not dispose of legislative competences in the crucial fields of labour market and social policies. On the other hand, it has to be stressed that most of the expectations and euphoria that accompanied the introduction of the European Employment Strategy in 1997 and the Open Method of Coordination in 2000 could not be achieved. Since the outcome of these new policy instruments is difficult to assess, it is all the more important to clarify the legal boundaries of the instrument and thus to determine the relationship between hard and soft law policy instruments.

2. Equal opportunities between men and women and gender mainstreaming under the EES and the OMC – characteristics and development

Initially introduced in the field of economic policies by the Treaty of Maastricht and enshrined in Art. 99 EC, the coordination instrument gained importance for the field of gender equality policies with the introduction of the second coordination process known as the European Employment Strategy under Art. 125 et seqq. EC by the Treaty of Amsterdam. The 1998 employment guidelines included the strengthening of equal opportunities between men and women as one of its four pillars⁽⁶⁾ and added one year the commitment to gender mainstream all policy areas.⁽⁷⁾ In 2000 the Lisbon European Council⁽⁸⁾ extended the coordination instrument to further social policy areas and referred to it as the Open Method of Coordination without, however, enshrining it in the EC treaty. The so-called social inclusion-OMC is of relevance to the issue of equal opportunities between men and women since women are to larger extent than men faced with the problem and the consequences of social exclusion resulting from unemployment or poverty in general (Rubery et al., 2005:619).

In order to understand in what way the instrument of the EES and the OMC differ from the community method and why these instruments developed, recourse shall be made to the general functioning and features of the EES and the OMC as well as on their development before looking at the specific aspect of gender equality policy in the processes of the EES and the OMC.

2.1. The characteristics of the European Employment Strategy (EES) and the Open Method of Coordination (OMC) – Departure from the Community Method

The EES as introduced by the Luxembourg European Council in 1997 and the OMC as developed by the Lisbon European Council in 2000 differ in various aspects from traditional instruments of EC law, such as the legislative instruments under Art. 249 EC.

The traditional community method has as its characteristics the transfer of powers from the member states to the EC, the central role of the Commission, the Council and the Parliament in the decision-making process, the adoption of binding rules whose application can be reviewed by the European Court of Justice (ECJ). All these elements differ from modes of international cooperation and have brought the EC closer to a federal-type system, in other words to a supranational system characterised by the concept of supremacy or direct effect.⁽⁹⁾

The coordination process, however, has a different institutional setting and is of a different legal nature. It gives a strong role to the European Council and the Council; it allows for Community action outside the fields of European competences, it renounces the legally binding and reviewable character of traditional community acts by instruments of multilateral surveillance, benchmarking and peer review. The systematic search for comparison and knowledge is supposed to cause pressure and willingness among the Member States to perform best and thereby to comply with the adopted common European indicators.

Apart from these common characteristics, the EES and the OMC differ simply because the EES has been brought into a clear treaty base and thus a prescribed structure whereas the OMC varies according to its field of application. A brief description of the EES process as well as the social-inclusion OMC shall underline theses differences.

2.1.1. The coordination process under the EES pursuant to Art. 128 EC

The actual process of the EES is, in contrast to the OMC, enshrined in the EC treaty in Art. 125 et seqq. EC and in particular in Art. 128 EC. The core instruments of the employment coordination process are the so-called employment guidelines. On the basis of the conclusions given by the European Council at the yearly spring summit, the Council adopts the employment guidelines on proposal from the Commission. The European Parliament's powers are limited to a consultation right. After the adoption of the guidelines, Member States shall frame their national labour policies in the light of the European employment guidelines and shall provide the Council and the Commission with an annual report under Art. 128 para. 3 EC. Even though Member States are obliged to participate in the coordination process, there is no requirement to *implement* the employment guidelines as it would be the case under the EC's legislative instruments (Häde 2007:Art. 99 par.5-6). On the basis of the national reports, the Council and the Commission examine the national policy approaches. If national policies conflict with the European employment guidelines, the only "sanction" available under Art. 128 para. 3 EC is the adoption of legally not binding recommendations to the Member State in question. The results of the examination process are summarised in a joint implementation report of the Council and the Commission under Art. 128 para. 4 EC, and submitted to the European Council as the basis for the latter's conclusions at the yearly spring summit. ⁽¹⁰⁾ The EES-process, which had originally been established as a yearly process, has been changed into a triennial one, which, however, still provides for a yearly update of the employment guidelines and national reports.

2.1.2. The Open Method of Coordination (OMC)

The Lisbon European Council in 2000⁽¹¹⁾ expanded the use of the coordination instrument to further areas of social policy and referred to it as the Open Method of Coordination (OMC). In contrast to the EES under Art. 128 EC and the economic policy coordination process under Art. 99 EC, the OMC has itself not been incorporated into

the EC treaty. According to the Lisbon European Council the OMC has to be understood as an independent political process which aims to support Member States in the development of their own policies and which involves the adoption of European guidelines, indicators and/or benchmarks as well as the establishment of regular monitoring processes to control Member States' progress.⁽¹²⁾

For the purpose of this paper, the social inclusion-OMC is relevant for the issue of policy, even though it has to be stressed that the OMC has been extended continuously to other social policy fields, which can, however, not be covered in this paper.⁽¹³⁾ The social inclusion-OMC was one of the first OMC-processes that were agreed upon at the Nice summit meeting in December 2000⁽¹⁴⁾. It aims to facilitate participation in employment and access by all to resources, goods and services and thereby to prevent the risk of exclusion. The issue of gender equality is of relevance within all fields of possible social exclusion and thereby needs to be mainstreamed in all areas which relate to employment policy. In a biennial process, the social inclusion-OMC aims to combine common European objectives, National Action Plans and Community programmes.⁽¹⁵⁾ The common objectives and indicators are, similar to the EES, set by the Council and Commission. Member States are required to submit every other year National Actions Plans (NAP), which are then reviewed and summarised in a joint report of the Council and the Commission. In contrast to the EES, the social inclusion-OMC does not allow for the adoption of recommendations to Member States. The review mechanism is thereby limited to the submission of a joint report by the Commission and the Council, which reduces the pressure on Member States.⁽¹⁶⁾

2.2. The European evolution of “new modes of governance”

The development of coordination processes which make use of non-binding instruments surprises at first glance and raises the question why the EC as a supranational legal order has made recourse to instruments of multilateral surveillance which have been applied by traditional international organisations (Schäfer, 2005:18), such as the Organization for Economic Co-operation and Development (OECD)⁽¹⁷⁾ or the International Monetary Fund (IMF)⁽¹⁸⁾ for years.

On the other hand, the use of soft mechanism is not unknown within the context of the EC itself. Especially in the field of labour policy as well as social policy, it can be noted that there has always been a tendency to include soft policy instruments outside the community method (Kilpatrick, 2006:122) such as the use of supporting community action programmes developed under the European Social Fund (ESF)⁽¹⁹⁾, the community action programmes on equal opportunities for men and women,⁽²⁰⁾ or the more recent community action programmes to combat social exclusion adopted for the first time in 2000.⁽²¹⁾

Despite this long-standing use of what can be summarised as soft law instruments within the context of the EC or the existence of similar forms of cooperation in the practice of international organisations, there is something special about the coordination instrument which requires a more precise look at the emergence of the coordination instrument on a European level Scott and Trubek, 2002:5).

The European Monetary Union (EMU) can clearly be considered as one important starting point for the development of “new modes of governance”. The introduction of a common European currency have increased the interdependence of national economies and thus reduced the Member States margin for manoeuvre in a number of policy fields outside the EC's competences (Borrás and Jacobsson, 2004:186). This limitation of Member States' room for manoeuvre caused the need for some form of policy cooperation to overcome the legal split of competences.

Apart from the currency background, the high unemployment rate and especially the low employment rate of women in the majority of European countries, the under-development of the service sector and a number of common European concerns relating to the financing and organisation of social security schemes made it necessary to develop a common and coherent European approach in fields outside the core of the single market. Due to the lack of European competences and the reluctance of political leaders to agree on a further transfer of competences in areas, such as employment policy, health policy and social policy in general, the second half of the 1990s was marked by a search for institutional alternatives. The coordination processes enshrined in Art. 99 and Art. 128 of the EC treaty are one attempt to satisfy this quest for renewal (Dehousse, 2002:2).

The “turn towards new modes of governance” (Joerges and Everson, 2005:161, 169) is not a phenomenon which occurred exclusively within the context of the EU, it is rather part of a general development at all levels, i.e. the international, the European and the national level. The increasing complexity of decision-making processes, the European or even international influence or in other words the phenomenon of globalisation has shown the need to integrate expertise and/or organisational capacities of non-governmental actors into the decision-making process on all levels. On an international level, international organisations as well as Non-Governmental Organisations (NGOs) or even transnational corporations (Rosenau, 1992:1, Ruffert, 2004:20-21) have gained significant influence over the years. On German national level, the changing role of the state and the inclusion of private actors into public policy arrangements have been on the political agenda for years (Ruffert, 2004:17-19, Schuppert, 2005:371). The European level had gone through various stages of regulation, deregulation and re-regulation expressing the search for the appropriate form of governance(22) even before the actual usage of the term governance occurred within the context of the EC.

The emergence of the coordination instrument thus differs from previous forms of soft law instruments in the context of the EC and is part of general debate on the renewal of traditional integration techniques.

2.3. The development of gender policies under the coordination processes

After having referred to the general development and functioning of the two coordination processes, a more precise look at gender equally perspective of the EES and the OMC will follow including the various changes and stages of this development.

The 1993 Delors White Paper(23) , which is often described as a starting point for the European Employment Strategy (EES), made no mention of gender aspects whatsoever and ignored that changes in the European labour market had taken place and that unemployment could not be tackled successfully without considering the gender dimension of the labour market. The negative employment situation and in particular the high unemployment rate among women in most European countries in the 1990s as well as the series of negative consequences for all national social security systems caused growing concern among EU officials and national political actors and pushed Member States to the recognition that the achievement of better employment targets firstly depended on a European approach and a certain coordination of relevant national policies and secondly needed to take into consideration the role of women in the labour market (Rubery, 2005:393). The awareness of considering women as part of the labour market was presumably not only due to the high unemployment rates in Europe, but also due to a gradual move towards gender equality issues developed during the last 40 years pushing for equal education. Consequently, with the development of the European Employment Strategy in 1997, the gender dimension of the labour market was for the first time firmly embedded in the European context.

The latter conclusion might seem surprising given that the already mentioned approach taken under the traditional community method has contributed significantly to the equality between men and women. What has, however, to be stressed is the fact that gender equality issues under the traditional community method were limited to the field of labour law whereas the coordination instrument expands the aim of gender equality to new areas, such as employment and labour market policy respectively as well as social policies. Within these fields, the EC disposes of no or only very limited *legislative* competences. It is thus important to state that the introduction of the EES recognised the role of women as part of the labour market and thus expanded the concept of equal opportunities to new, albeit interrelated policy fields. There are some predecessors in view of the issues of work-family reconciliation, such as the non-binding Council recommendation on child care(24) or the financially supporting programmes under the European Social Fund, but the coordination instrument added nevertheless a clear inclusion of the role of women in labour market and employment policies by recognising them as part of the employment/unemployment rate.

2.3.1. Equal opportunities between men and women and Gender Mainstreaming under the European Employment Strategy (EES)

The EES as one of the most advanced coordination process is now entering its third phase.(25) The changes and review processes made under the different phases of the EES are of relevance for the aspect of gender policies as

they caused various “ups and downs” (Rubery et al., 2005:603) of the commitment towards equal opportunities and gender mainstreaming.

The first phase of the European Employment Strategy (1997-2002) as established by the European Council in Luxemburg 1997 already included and incorporated the issue of equal opportunities between men and women in employment processes as one of its four pillars⁽²⁶⁾ and extended this commitment in 1998 to a gender mainstreaming of all policies.⁽²⁷⁾ The Council recommendations to the Member States adopted under the EES followed this approach and included recommendations concerning both equal opportunity specific policies and gender mainstreaming.⁽²⁸⁾ Furthermore, equality targets were set including a specific female employment rate target for 2005-2010.⁽²⁹⁾ Similar targets were adopted in view of childcare provisions during the second phase of the EES following the Barcelona European summit in 2002⁽³⁰⁾ aimed at lowering obstacles for women to re-enter the labour market.

The Commission’s first assessment report in 1998 stressed that the main focus of the Member States was given to the first pillar of the EES, i.e. the employability pillar. In view of the equal opportunity pillar, there was a considerable awareness among Member States, even though the number of concrete actions was rather limited. The EES helped, however, to put the gender dimension of the labour market on the political agenda and stimulated institutional innovations. Germany, for example, enshrined its commitment to gender mainstreaming in areas of public administration, as for example in § 2 of the Rules of Procedure of the Federal Ministries⁽³¹⁾ (Gemeinsame Geschäftsordnung der Bundesministerien). More importantly, the German legislator adopted a new Act on Equality between Men and Women in Federal Public Administration and in Federal Courts⁽³²⁾ and expanded steadily since 2001 the act on parental leave and on parental care allowances.⁽³³⁾ The question has clearly to be raised, to what extent these policy changes on a national level can actually be attributed directly to the EES. A clear causal link in view of specific measure can clearly not be drawn. Since the coordination instrument lacks coercive means, changes on a national level depend to a large extent on the political circumstances at the national level rather than on the policy guidelines of the EES. It can, however, be stated that the EES helped to increase the Member States’ awareness on the role of women. It allowed for information exchange in view of other Member States’ approaches and forced Member States to discuss the need for change in the classical approach towards labour market policies.

Apart from initiatives in the area of public administration, some national governments undertook changes in tax policies and modified their taxation systems in order to remove disincentives to work.⁽³⁴⁾ The problem which arises especially in view of tax reforms is the lack of common European definition of what the final aim of female employment should look like. Only few countries follow a dual-earner money whereas the majority of countries, among them especially Germany, focus on a one-and-a-half-earner model and increase the possibilities for part-time work. Supported by the European structural funds, a number of Member States established programmes to support the development of female entrepreneurship. Consequently, at the end of the first phase of the EES (1997-2002) most of the EU-Member States had put into place some formal mechanism for gender mainstreaming (Rubery, 2005:396).

The first five years of the EES thereby gave positive incentives to national policy processes and caused significant pressure among Member States to put a higher emphasis on the role of women in employment processes. This positive development was to a certain extent due to the fact that between 1999 and 2001 a number of countries with an already well developed national gender policy were in charge of the Council presidency.⁽³⁵⁾

The so-called second phase of the EES (2002-2005) was marked by a number of reforms and revision of the coordination process. On request of the European Commission, the Barcelona European Council 2002⁽³⁶⁾ approved the streamlining and integration of the two coordination processes enshrined in the EC treaty, i.e. the EES under Art. 128 EC and the process of economic policy coordination under Art. 99 EC. The review of these two processes aimed to synchronise the employment guidelines under Art. 128 EC with the broad economic policy guidelines (BEPG) under Art. 99 EC, requiring reports on both aspects of economic policy at the same time.⁽³⁷⁾ The second phase of gender policies under the EES was thus subject to various changes. The synchronisation of the two processes was on the one hand positive for the gender equality dimension of the EES since it allowed for a wider application of the gender mainstreaming concept. On the other hand, there was a

danger that the employment coordination process could lose importance. Art. 126 para. 2 EC asks for the consistency of the employment guidelines with the broad economic guidelines and thereby already considers the EES as secondary to the overall economic strategy. A synchronisation of the two processes could further weaken the status of the European Employment Strategy as an independent coordination process.

Apart from these procedural changes, the Commission expressed the need to reduce the number of general objectives. The original four pillars of the EES were replaced by three overarching and complementary objectives of full employment, quality and productivity at work as well as social inclusion and cohesion.⁽³⁸⁾ The previous pillar on equal opportunities between men and women was no longer one of the three overarching objectives, but remained one of the ten priorities⁽³⁹⁾ which aimed to support the three objectives. Furthermore, the EES, following the treaty amendments of Amsterdam, expanded its gender anti-discrimination policy to discrimination related to race, ethnicity, sexual orientation and age.⁽⁴⁰⁾ These substantive changes to the scope and priorities of the EES once more raised the question of whether the issue of gender equality had been watered down during the second phase of the EES. There were at least certain reasons to claim it had. The issue of equal opportunities between men and women clearly lost its visibility. The expansion of the non-discrimination agenda to new forms of discrimination could have shifted the focus of equality policies away from the gender policy dimension. On the other hand, there was a chance to increase the importance of anti-discrimination policy as a whole. The three overarching objectives, i.e. full employment, job quality and productivity as well as social inclusion and cohesion were of particular relevance for the issue of equal opportunities between men and women and did all fit very well with the different needs of women in the labour market (Rubery et al., 2003:492-493).

The first employment guidelines under the streamlined coordination process were adopted in June 2003, followed by the new National Action Plans (NAPs) in autumn 2003. The dual focus on equal opportunities between men and women policy and gender mainstreaming which was chosen as an approach during the first phase of the EES was maintained, but less visible under the 2003 employment guidelines. In contrast to the previous guidelines neither definitions nor examples of how to apply gender mainstreaming to various areas of the EES were given, so that the 2003 employment guidelines concentrated on gender equality approach and reduced the attention paid to the principle of gender mainstreaming (Fagan et al., 2006:572), which could again reduce the pressure on the Member States and thus the potentials a process of multi-lateral surveillance might offer. As a consequence hereof, the majority of Member States made almost no reference to gender mainstreaming in their National Action Plans in autumn 2003.

In view of the setting of quantitative targets on employment rates, the 2003 EES guidelines repeated its commitments to the employment rate targets as set at the Lisbon summit in 2000, but did not include the wider Commission proposal to eliminate the gender unemployment gap and to halve the gender pay gap by 2010. The introduction of the equal pay target into the EES failed several times, but it shows that there is a need to address this issue outside the existing legislative approaches under the community method which could not overcome the gender pay gap in Europe.⁽⁴¹⁾

The conclusion to be drawn from the second phase of the EES is neither positive nor negative. The employment rate of women in 2003 increased to 55, 6% and gave reason for optimism to remain on track towards the immediate target of 57% for 2005.⁽⁴²⁾ One year later, however, the overall employment rate stagnated and thus progress towards the female employment rate target of 60% by 2010 slowed.⁽⁴³⁾ One reason for the shortfall in 2004, even though it was by far not the sole factor, was the 5th enlargement of the EC by 10 new Member States and the widespread loss of jobs for both sexes in the former communist regimes which had occurred particularly in the first half of the 1990s and which could not be overcome to date. Nevertheless, the institutional innovations in the 10 new Member States in relation to equal opportunities between men and women as well as to gender mainstreaming in the immediate run-up to accession were more advanced than the ones in some of the old Member States (Fagan et al., 2005:570).

The importance of personalities and political directions is always evident within the political process in the context of the EC. During the second phase of the EES conservative parties dominated national governments. Under these circumstances, it was probably not possible to establish more progressive aims under the EES, and probably best to “hold the line” (Rubery, 2005:413).

In 2005 the second significant reform of the EES was adopted as part of the general review of the Lisbon-Strategy and marked as a consequence the starting point for a new phase, i.e. the third phase of the EES (2005-2008).⁽⁴⁴⁾ The streamlining and synchronisation of the EES and the coordination of economic policies which had been started in 2002 and which had led to a re-organisation of the two annual coordination processes into triennial processes was continued in 2005. Apart from the already existing temporal synchronisation, a better coordination as regards the content was aimed. The employment guidelines and the broad economic policy guidelines are now adopted on the same day and are summarised within one single document, the so-called integrated guidelines.⁽⁴⁵⁾ There are, however, still two different processes according to its different procedural requirements under Art. 99 EC and Art. 128 EC respectively. The new cycle of economic and employment coordination based on the integrated guidelines of 2005 is organised as a triennial process and remains thereby valid until 2008.

Apart from the general synchronisation of the two coordination processes, the number of general objectives was further reduced to economic growth and jobs, so that the equality target remains again outside the general pillars of the EES. Apart from the changes on the European level, Member States will after the reform of the Lisbon-Strategy be asked to provide for so called National Reform Programmes (NRPs)⁽⁴⁶⁾ adopted according to the structure of the integrated guidelines every third year. The NRPs synchronise thus the reporting duties of the Member States, but allow on the other hand for new freedom on the national level to determine their focus within the integrated guidelines (Fagan et al., 2006:572).

The 2005 employment guidelines which do not provide for a specific equality pillar keep, however, the employment targets for women as enshrined in the 2002 EES guidelines.⁽⁴⁷⁾ Furthermore, they include various elements of gender equality policy, such as the increase of the number of women in employment, the abolishment of discrimination in view of access to employment, employment conditions and pay as well as the issue of reconciliation between work and private life including accessible and affordable child care facilities. No new targets have, however, been set under the employment guidelines and the gender equality approach again lost its visibility. Streamlining has thus further limited the gender equality approach to a mere raise of employment rates and failed to develop the second objective of gender mainstreaming within the integrated guidelines.

As a consequence, similar reduced attention towards gender equality policy can be noticed under the first National Reform Plans (NRPs) submitted by the Member States in 2005. Original commitments to decrease the gender gap according to the set targets have disappeared in the NRPs of most countries after 2004. Furthermore, as shown during the first and second phase, almost all national action plans displayed a low level of gender mainstreaming actions.⁽⁴⁸⁾

After this rather dissatisfying development in the area of gender policies, the European Council in 2006 adopted the so-called “European Pact for Gender Equality”.⁽⁴⁹⁾ The pact aims to support policy measures on a national level which relate to three main issues, i.e. measures to close the gender gap and to combat gender stereotypes in the labour market, measures to promote a better work-life balance for all, and measures to reinforce governance through gender mainstreaming including better monitoring. The same aims and the dual approach of gender equality and gender mainstreaming have been enshrined in the Commission’s roadmap towards gender equality⁽⁵⁰⁾, a Commission’s initiative building on the Framework Strategy for equality between men and women (2001-2005) and setting up a new European institute for gender equality aimed to review all existing gender equality law as well as to collect relevant information and statistics.

The latter incentives taken on the European level in 2006 are, however, of rather political value and are not reflected in the progress reports on the NRPS published in 2006. Most national progress reports pay only limited attention to gender equality policies. They are mentioned in relation to work-family reconciliation whereas a number of countries still approaches the reconciliation issue through an increase of part-time work contracts and thus indirectly supports the traditional gender division of labour.⁽⁵¹⁾ There are positive developments in view of the employment rate of women of 60% by 2010 as formulated under the Lisbon target.⁽⁵²⁾ The concept of gender mainstreaming has, however, not even mentioned in a number of progress reports.

The conclusion which can thus be drawn in 2007 is a rather negative one. Even though the new cycle is still in progress, the issue of gender equality and especially the concept of gender mainstreaming lost importance. Even

though the first joint employment report 2005/06⁽⁵³⁾ stressed positively the higher consistency between the social inclusion-OMC and the processes under the economic policy and employment coordination process, streamlining has not been a contribution to the field of gender equality. Quite the contrary, streamlining has further decreased the visibility of the gender equality objectives and thus the Member States' commitment to gender equality and gender mainstreaming. Even if there might be some positive reforms in some countries, there is no even and systematic approach. The main focus of the integrated guidelines of 2005-2008 is the rise of employment rates of women without however taking a greater effort towards a more "rounded gender equality objective" (Fagan et al., 2006:586).

2.3.2. Equal opportunities between men and women and gender mainstreaming under the social inclusion-OMC ↑

With the extension of the coordination instrument to other policy areas under the so-called Open Method of Coordination (OMC) as established by the Lisbon European Council 2000, the issues of equal opportunities between men and women and gender mainstreaming became an issue within the social inclusion process. The European Council in Lisbon 2000 agreed on the development of a strategy to combat any form of social exclusion, thus to combat gender discrimination as one form of social exclusion and to gender mainstream all policy fields. The idea behind the social inclusion process in view of the gender policies was to combine in an integrated approach the fight against poverty, social exclusion and the promotion of equality between men and women.⁽⁵⁴⁾ All three fields are interrelated areas since women are to a higher percentage economically inactive as they tend to be responsible for the major share of unpaid work in the family or if they work, they often earn less than men. Poverty among elderly women is one consequence and linked to systems of pension schemes which are designed for men working continuously and full-time. Apart from poverty among the elderly, women comprise the majority of single parents and cumulatively constitute the majority of the poor (Rees, 1988:176). It is thus the essence of the mainstreaming approach to show how apparently gender-neutral practices, in fact, act as exclusionary mechanisms for women (Rees, 1988:189).

The first set of objectives under the biennial social inclusion-OMC was adopted by the Nice European Council in December 2000.⁽⁵⁵⁾ The social inclusion-OMC aims to support the aim of gender equality under the EES by alleviating some structural problems, such as the promotion of reconciliation between work and family life, including the issue of childcare, and the promotion of social integration of women at risk of facing persistent poverty. After the first round of rather broad and prescriptive NAPs, the Council highlighted in its revised objectives in 2002 the need to put higher emphasis on the development, implementation and monitoring of the equal opportunities and gender mainstreaming dimension.⁽⁵⁶⁾ The second joint report on social inclusion in 2005 repeated the need for more consistency of national policies towards the gender dimension of social exclusion. To date, only the minority of Member States⁽⁵⁷⁾ provided for consistent mainstreaming across social policy fields. In the majority of Member States, gender equality did not appear as policy priorities under their NAPs. Gender equality was often used as a mean to achieve objectives in other fields, such as child poverty or family crisis, but not as an objective to be pursued in its own right when dealing with combating poverty and social exclusion.

Following the reform of the Lisbon Strategy in 2005, the OMC social inclusion process has been reviewed and streamlined. A new overarching framework of social inclusion and social protection was adopted in 2006 which covers the areas social inclusion as well as pensions and health and long-term care,⁽⁵⁸⁾ and which provides for temporal coherence with the EES under Art. 128 EC and the economic policy coordination process under Art. 99 EC. The streamlining of the different coordination processes aims to reduce and to facilitate Member States' obligation to submit NAPs in order to put a higher emphasis on the implementation on a national level. The new overarching social inclusion process names as the first of three general objectives adopted by the Brussels European Council in March 2006: social cohesion, equality between men and women and equal opportunities for all through adequate, accessible and financially sustainable efficient social protection systems and inclusion policies. The reporting system of the Member States is now referred to as National Reports on Strategies for Social Protection and Social Inclusion. The majority of national reports draws a positive conclusion in view of increasing female employment rate.⁽⁵⁹⁾ Reference to specific gender equality measures is mostly limited to work-family reconciliation measures. Gender mainstreaming is stressed as an aim to be achieved without, however, mentioning concrete policy measures.

The first joint report after the reform of the social inclusion OMC of 2007 thus refers to gender equality aspects merely as a means to an end. The issue of work-family reconciliation is considered as being significant for the reduction of child poverty without referring to the gender equality issue as such. The concept of gender mainstreaming remains completely out of the picture. Generally speaking, the social inclusion aspect in general lost its importance compared to healthcare and long-term care as well as pensions-OMC since the latter fields raise the more urgent question of long-term sustainability and are thus supported by a general national consensus to act.

To date, the overall strategic approach of the social inclusion process lacks thus a clear gender analysis, and it is difficult to tell whether gender mainstreaming is more than a very popular slogan. A consistent approach to advance gender equality across the full spectrum of social inclusion objectives has not been established so far.

2.4. Summary

The practical results of the EES or the OMC in terms of equal opportunities between men and women and gender mainstreaming are limited. The recognition of the gender policy dimension as an economic and social factor has, however, been strengthened by the EES and OMC and has gained higher importance on the political agenda. The adoption of the so-called “European Pact for Gender Equality” by the Brussels European Council in 2006⁽⁶⁰⁾ underlines this considerably risen awareness of the gender equality dimension in recent years. Implementation of new approaches to policy-making takes, however, time; and evaluations of the impact of these two coordination processes are difficult to make since many policy strategies have not yet been implemented, or are only in the planning phase. The application of the coordination instrument in view of gender equality issues can nevertheless be classified as a reaction to new realities and thus as a reaction to a need to expand the gender dimension to new policy fields.

3. The strengths and weakness of the coordination instrument and specific concerns in the area of gender policies

After having analysed the development of the coordination process, the strengths and weaknesses of the coordination instrument shall be highlighted both in view of general characteristics and in view of the specific aspect of gender equality policies.

3.1. The strengths of the EES and the OMC

As stated above, the coordination instrument developed out of a need for a certain degree of convergence in interdependent policy areas, i.e. in policy fields which are outside the core of the common market and thus the EC’s legislative competences, but which nevertheless have a certain impact on European policy fields. The reliance on a soft policy instrument in the area of labour and social policies helped to react to such a need of policy convergence and thus offered a policy outcome which could not be achieved by reference to the Community method.

3.1.1. The decentralised and flexible approach of the EES and OMC

The EES and the OMC put a procedural obligation on Member States to participate in the coordination process, but do not require Member States to transfer legislative or regulatory competences on a European level. Consequently, the coordination processes take a decentralised approach. Due to very different national approaches to employment and social policy and the very different national commitments towards and the understanding of what is considered to be gender equality, it is difficult to imagine that the harmonisation of laws under the traditional community method could reach effective and/or desirable results. The starting point of the employment strategy and the Open Method of Coordination therefore seems to be right. The decentralised element allows for higher flexibility since European initiatives or ideas can be adapted to the diverse national legal regimes or institutional particularities (Dehousse, 2002:4).

3.1.2. The overcoming of political resistance on all levels

The coordination process reduces political costs of national governments and can thus have the potential to develop ideas further than on a national level where sensitive issues of labour law or social policies are immediately subject to party political conflicts. The possibility of flexible agreements on a European level may surmount resistance towards a European commitment and may free the discussion from internal national problems. European involvement often causes less domestic opposition than pure national initiatives, so that the coordination processes broaden the room for manoeuvre of national governments (Metz, 2005:9).

The overcoming of political resistance was and is especially relevant for the field of gender policies. The importance of the gender dimension of the labour market was by no means an immediate or automatic recognition, but subject to a longer development (Rubery, 2005:393). It was not until the Luxembourg process in 1997 that the gender dimension of the labour market gained importance on the political agenda. It is very likely that this awareness among the EU Member States would not have been achieved with similar rapidity without a common European approach.

3.1.3. The potential of widening participation

The coordination instrument aims to develop policy initiatives not “top down”, but from collective work bringing together “(...) the Union, the Member States, the regional and local levels, as well as the social partners and civil society”.⁽⁶¹⁾ The participation of non-governmental actors on a national level lies, however, within the discretion of the Member States, so that to date there is no clear evidence whether or not Member States have used its discretion to broaden participation. In fact, national debates on policy initiatives stemming from the EES or the social inclusion-OMC seem often to be limited to ministerial level.

3.1.4. Summary

The coordination processes offer a new approach towards policy convergence by referring to soft instruments rather than by relying on legally binding legislative instruments. The strengths mentioned above bear at the same time a number of risks, especially for the law and traditional legal principles, such as democratic legitimacy, institutional balance etc. (Schäfer, 2006:84). It is, nevertheless, worthwhile to mention these positive elements without making a final remark on the overall legitimacy of the coordination processes at this point. The comparison between strengths and weaknesses shall, however, help to figure out where improvement is necessary and how to use the potentials of the coordination processes without sacrificing legal principles.

3.2. The weaknesses of the EES and the OMC in the area of gender policy

The soft policy approach taken under the coordination processes changes the traditional idea of integration under the community method. The supranational elements which distinguish the EC from other international organisations are not present in the coordination processes and thus pose a number of threats to the highly elaborated Community legal system. Apart from legitimacy concerns, there are a number of factual shortcomings questioning the effectiveness or even usefulness of the coordination instrument in general.

3.2.1. Legitimacy concerns of the coordination instrument – The relationship between legal and non-legal instruments

The evolution of new modes of governance on a European level has on the one hand expanded the field of action of the EC, but has, on the other hand, led to a gap between the hard law instruments named in the Treaty and the practice of EC actions, i.e. the soft policy instruments developed outside the Treaty (Bast, 2006). Under the original conception of European integration, policy convergence among the Member States should be achieved by means of law, i.e. by the adoption of legal norms, which enjoy direct effect and supremacy.⁽⁶²⁾ These two characteristics, which distinguish the EC from traditional international organisation, ensured the effectiveness of European law on the one hand and combined it with the protection of individuals' rights on the other hand. Consequently, the traditional concept of legal integration could provide for a sufficient legitimacy of the EC's

actions.

With the development and steady increase of soft policy instruments in the context of the EC, these original legitimacy strands are put into questions. Non-binding norms or in the case of the coordination instrument not even norms, but merely procedural frameworks, can neither be of supremacy nor of direct effect due to a lack of invocability of soft policy instruments (Hatzopoulos, 2007:339). Even though it is true that the coordination processes do not adversely effects the existing “acquis”, they leave the EC with a significant amount of new integration tools which are not associated anymore with the two fundamental characteristics of direct effect and supremacy. The gap between practice and original conception thus challenges the legitimacy of these new instruments (Schäfer, 2006:84), which were not part of the original idea of European integration or which have at least taken a different development as originally assumed.

There is thus a threat that Member States extend the areas of application under the OMC, which offer lower political cost and thereby circumvent the legislative instruments of the EC treaty and undermine important legal concepts, such as democratic legitimacy, the need for accountability of actors as well as the division of competences. Precisely because there is no clear empirical evidence on the success or failure of coordination processes, legal principles cannot be sacrificed for an uncertain outcome of the coordination processes.

An increase of the legitimacy of the coordination instrument could simply be achieved by enshrining the coordination and its fields of application into the EC treaty as some of procedural competence category. This would reduce the gap between the instruments named in the EC treaty and the “reality of European instruments” and thus increase the transparency of the coordination processes. A clarification on the relationship between traditional legal instruments and soft policy forms needs thus to be enshrined in the EC treaty.

3.2.2. Actor participation and the lack of transparency ↑

The institutional setting of the coordination processes aims on the one hand to broaden participation of non-governmental actors on a national level, but does on the other hand strengthen on a European level the role of the European Council and the Council as the direct representations of national governments. Neither under the EES nor under the OMC the European Parliament is involved in the actual coordination processes, so that this undermines the approach taken under the community method. On a national level, the objectives of the coordination processes were ambitious, but reality has shown that participation has mostly been limited to government officials. Neither the national parliaments nor stakeholders are involved, which makes the process on a national level even more intransparent than the one on the European level (Büchs and Friedrich, 2005:256-60, Porte and Pochet, 2005:382). Transparency would, however, be an important requirement to increase public pressure and thus to use the potential multilateral surveillance offers. The involvement of a high number of actors as such does not automatically imply a high degree of legitimacy. A high number of actors does rather presupposes procedural rules laying down the process of participation and some form of selection and review process of the actor involvement to allow for some form of actor accountability.

3.2.3. The role of rights ↑

Apart from the institutional setting, the role of rights is an unanswered concern within the coordination processes. The EES and the social inclusion OMC do not define specific results, but are rather processes, which might lead to mutual learning and satisfactory policy outcomes over time. A traditional rights-based approach seems thus be excluded by the procedural nature of the EES and the OMC. On the other hand, the use of the coordination instruments in areas such as employment market and social policies involves especially vulnerable groups of individuals who cannot protest against an undesirable change or race to the bottom. It is thus necessary to think of ways to ensure and reflect certain constitutional values within the coordination process (De Búrca, 2003:833).

3.2.4. The problem of compliance ↑

The EES’s and the OMC’s decentralised and flexible approach bears, apart from its advantages mentioned above, a number of negative concerns. The high flexibility for Member States on how to integrate European indicators in

their national policies is a consequence of the soft approach of the coordination instrument. A soft policy approach lacks by definition legal control over Member States' behaviour and it is indeed difficult to imagine, that the reliance on political can lead to effective legislative output or outcomes on a member state level, or in other words that there is compliance "without the shadow of hierarchy" (Héritier, 2002:198).

There are, however, European examples, where the reliance on political will did work. The most famous one is probably the preparation of the European Monetary Union (EMU). The second stage of the successive way towards a common currency included the adoption of convergence criteria and followed a legally non-binding monitoring process.⁽⁶³⁾ Here, the possible accession to the Euro currency created enough positive incentives for Member States to change their national policies in order to fulfil the European convergence criteria. In view of labour or social policies and thus in view of the aim of gender equality such clear incentives do not exist, so that positive outcomes might be less likely. It would, nevertheless, be premature at this point to draw the conclusion that the EES and the OMC cannot be successful. Apart from the special incentive of acceding to the Euro currency, the monitoring process under the preparation stage to the EMU was based on precise rules of procedure, a characteristic which helped to increase public pressure. The two coordination processes enshrined in the EC treaty in Art. 128 EC and Art. 99 EC also dispose of certain procedural strictness and are thus capable of putting Member States under pressure. The social inclusion-OMC, which is not enshrined in the EC treaty, lacks such a procedural clarity and limits the potentials of multilateral surveillance. It has thereby often been argued that despite the advantage of flexibility, the OMC seems "too open" (Rubery, 2005:391, Sturm, 2006:328) to encourage Member States to take action. The assessment of the impact of European politics on national policies is, however, not only in view of the coordination processes, but also in view of hard European instruments highly contested. The difficulties of assessing the Europeanisation of national laws is thus not only due to the soft character of the coordination instrument, but a general problem stemming from the complexity of the multi-level system of the EU. Some new incentives could probably be given by a perspective, which evolved in the political science literature on Europeanisation some time ago, i.e. the downloading and uploading of agendas between the national and the European level (Börzel, 2005:50). According to this approach, impact on the national level cannot only be possible in the case of "integration through law", but also in the case of the OMC if there is a so called "misfit" between the European and the national levels which drives Member States to reshape European policies to respond to national pressure and vice-versa (Börzel, 2005:51).

A second issue linked to the problem of non-compliance, results from the fact that peer control through the Council as the main actor has by definition certain limitations. Ministerial representatives acting in the Council who represent national governments on the one hand do not want to embarrass a colleague of another government, and on the other hand do not want to present their own country in a negative way. Thus it remains questionable if National Action Plans (NAPs)/National Reform Plans (NRPs) contain anything other than positive remarks on national developments (Dehousse, 2002:19). Such a political dimension of the coordination processes does not surprise and exists under the traditional community method as well, but has probably not been given sufficient consideration in the formulation of the coordination processes and its institutional setting. It is thus necessary to strengthen the influence of the Commission and the European Parliament as well as the national parliaments in order to bring in some more objective assessment and a certain degree of accountability.

3.2.5. Lack of clear definitions

The huge amount of discretion offered to the Member States to specify the general guidelines and objectives laid down on a European level has led to negative impacts in view of the development of labour market policies and the aspect of gender equality on a national level. The 2003 Employment guidelines⁽⁶⁴⁾ enshrined, for example, an employment target for women of 57% by 2005 and of 60% by 2010 according to the share of the unemployed, but left the definition of unemployment to the Member States. A number of Member States limited the definition of unemployment to those who can claim social benefits, which excluded to a large extent married women who wanted to return to employment, but could not find work.

In a similar way, no explicit definition of what should constitute equal opportunities or greater gender equality was provided for on the European level. Consequently, Member States developed different final objectives of gender equality. Some Member States used the model of a dual earner career as the objective to be achieved and

therefore tried to increase childcare possibilities whereas others considered a one and a half earner model as final objective and consequently focused on the increase of part-time jobs. A third model, similar to a dual earner model, focussed on extended leaves and support for the re-entry into the labour market (Lewis, 2006:421-422).

To call for a unified single European model on gender equality in employment would, however, be the wrong conclusion to draw. It can be stated that the absence of any common definition cannot be successful either. In the absence of sufficiently clear common indicators and objectives, the potentials of multilateral surveillance and peer pressure break down.

3.2.6. Lack of awareness

Another weakness is the lack of knowledge and awareness towards the gender dimension of the labour market. The areas where quantitative targets are applied, such as the field of female employment rates or childcare provisions, show that the EES itself follows the idea to promote the second income earner and to presume that women as the second earner have the sole responsibility for childcare (Lewis, 2006:429). Such shortcomings result again from the fact that neither the EES nor the OMC have clarified the final objective of an equal opportunity policy before starting the actual coordination processes.

The lack of a final objective can further be demonstrated in view of the measures taken to close the gender gap in the labour market. These measures mainly focussed on active labour market programmes, childcare assistance or family taxation reforms. Attention to the quality of women's jobs, such as working conditions, pay or working time was largely neglected. Activation policies which do not consider the aspect of job quality will, however, not work in the long run. Here, only the UK tried to support sovereignty of choice by establishing a higher diversity in working time, but here again the focus of gender policies is on women only, without considering the behaviour of men and without trying to increase incentives for part-time work for male workers (Rubery, 2005:404).

3.2.7. Summary

It can be summarised that there are a number of concerns in view of the EES and the OMC which need to be addressed. The most important one is probably the relationship between the traditional community method and the coordination instrument.⁽⁶⁵⁾ In sectors where uniformity is needed, the more centralized Community method is the more appropriate form. In other areas, however, where national diversity does not allow for uniformity, flexible initiatives on a European level are needed. In these areas, such as the area of gender policies, the EES and the OMC might despite their shortcomings be considered as starting point for the development of more flexible integration techniques.

4. The race discrimination directive – A hybrid model of hard law and new governance forms

As shown in the paragraphs above, the field of gender equality policies has taken a development outside the community method adding to the traditional legislative instruments a soft instrument. What are the consequences of such a shift towards softer forms of governance? Does the emergence of “new modes of governance” in the field of gender policies replace existing legislation or jurisdiction of the ECJ? The paper argues that the emergence of the coordination instrument in the field of gender policies should not be misunderstood as an attempt to replace traditional legislative instruments. Even though the relationship between legislative instruments and the coordination processes has yet to be clarified, an analysis of “new modes of governance” needs to resist the temptation of contrasting the two concepts of legislation and coordination. Admittedly, the interrelated hard/soft law debate which developed further with the emergence of new forms of governance on a European level could make some contributions concerning the differences and particularities of both concepts, it could, however, not offer a final conclusion on the relationship of legislative instruments and coordination instruments. The development and expansion of the coordination instrument has shown that the hard/soft law dichotomy probably takes the wrong approach. The area of gender equality can be considered as evidence for a complementary rather than a supplementary use of softer forms of governance (Kilpatrick, 2006:134, Trubek and

Trubek, 2006:6-7).

Outside the field of gender policies, there are further examples in the general context of anti-discrimination policies where new modes of governance have been used in a different way, i.e. by developing so-called hybrid structures. A recent example belonging to the broader field of anti-discrimination policy is the Race Equality Directive 2000/43/EC⁽⁶⁶⁾, which takes a traditional legal rights-based approach open to judicial review, but adds some softer governance elements to the traditional hard law elements in view of the implementation and review process of the Directive (De Búrca, 2006:97). The Directive is, by no means, free from criticism (Hepple, 2004:1), but the purpose here is not to assess its success, but to point to the “hybrid approach” it takes.⁽⁶⁷⁾ The Race Equality Directive takes the form of a framework directive,⁽⁶⁸⁾ and is thereby by definition a less prescriptive legislative instrument allowing for a wide discretion in national implementation measures. Apart from these characteristics implied in its nature as a framework directive, the Race Directive interacts with the EU Action Programme against Discrimination.⁽⁶⁹⁾ It thereby follows the already established practice of linking social legislation with supporting community programmes⁽⁷⁰⁾, which in the field of anti-discrimination policy⁽⁷¹⁾ contributed especially to the work of NGOs engaged in research and data collection in discrimination policies.

What is, however, special about the Race Directive is that goes beyond a complementary use of soft policy forms, but enshrines forms of multilateral surveillance and review procedures in the Directive itself in view of the implementation of the Directive. It thus creates a hybrid form of governance. Art. 11 and 12 of the Race Equality Directive encourage the information exchange and cooperation with a number of specific networks, i.e. Member States are asked to promote social dialogue between the two sides of industry, and to encourage dialogue with relevant NGOs.⁽⁷²⁾ Apart from the obligation upon Member States to exchange information with relevant stakeholders, the Commission obliges itself in view of the revision of the Directive to take into account the view of the EC’s own anti-racism agency⁽⁷³⁾, of NGOs as well as of social partners of labour and industry.⁽⁷⁴⁾

The Race Equality Directive adds a further example on the compatibility of legislative instruments and softer governance elements in the area of anti-discrimination policies, but raises some more concerns on the long-term relationship between law and new governance forms and the effectiveness of hybrid forms. An example where a hybrid form of governance undermined at the end the effectiveness of hard law is the already mentioned Stability and Growth Pact (SGP) as an example for a hybrid form of governance combining hard law regulations and a soft law European Council Resolution. The SGP adds a soft policy procedure of multilateral surveillance as a first step to the hard deficit procedure under Art. 104 EC. Since the general objectives under soft multilateral surveillance procedure as a first step can be freely set by the Member States, it is unlikely that the hard law sanction provided for in Art. 104 EC will ever apply: First, Member States can fully master the setting of general objectives and can thus change the general objective each time one of the Member States is in breach with it. Second, given that the Member States are the masters of the general objectives, the legitimacy of the Commission and/or the Council as the institutions called upon to apply the hard law sanctions of Art 104 EC will be highly controversial (Hatzopoulos, 2007:322-23). The case of the deficit procedures against France and Germany in 2004⁽⁷⁵⁾ is probably the most notorious example of where Member States ignored their previous agreements enshrined in a regulation. It became furthermore clear how little the ECJ could do in fields which are covered by soft law procedures and thus left to the Member States (Hatzopoulos, 2007:323).

The development of hybrid forms has thus to be considered more seriously by the law in order to prevent situations as the ones mentioned under the SGP. Since the field of anti-discrimination policies is of special concern for the individual, the effectiveness of the traditional rights-based cannot be sacrificed for an uncertain outcome of the coordination processes.

5. Conclusion

With the development of the European Employment Strategy (EES) in 1997 and the establishment of Open Method of Coordination (OMC) in 2000, the area of equal opportunities between men and women and the concept of gender mainstreaming have become part of a new policy approach. The coordination processes demonstrate a departure from the traditional community method, i.e. in the area of gender policies a departure from the traditional legislative approach as well as from the jurisdiction of the European Court of Justice. The coordination

processes does not aim to produce law, but aim to achieve some degree of voluntary policy convergence (Scott and Trubek, 2002:5). The incentives for such a convergence are given on a European level through multilateral surveillance procedures whereas the actual policy change has to be taken on a national level.

This paper has shown that the coordination instrument developed as a consequence of the increasing interdependence of national economies which caused a need for coordinated policy approaches in areas outside the core of the common market. The labour and social policies are such interrelated fields and of particular relevance for gender policies. The negative economic background in the 1990s helped to recognise the gender dimension of the labour market and to develop a coordinated European approach towards equal opportunities between men and women and gender mainstreaming under the EES and the social inclusion-OMC. Not only that there was a need for a rapid approach to the mentioned problems, there was especially a need for decentralised approach which allows to pay attention to the significant diversity of national labour market systems, industrial relations or social security schemes.

So far, the history of gender policies under “new modes of governance” has been rather short and the analysis in this paper has probably revealed more weaknesses than positive results. There is, however, a higher awareness on gender equality issues in the area of labour policies and interrelated social aspects. Since 1997, gender equality has been more firmly considered in the context of the EC than ever before. The coordination processes consequently dispose of a certain potential which needs to be developed further and which has to address the mentioned shortcomings and legitimacy concerns of the coordination instrument.

Rather than trying to make a final remark on the effectiveness of the coordination instrument, this paper has sought to point to the emergence of softer forms of governance in the area of gender policies and to underline its complementary potentials as a starting point for a renewal of traditional integration techniques. Such a renewal might not be necessary in all policy areas, but it is needed in areas, which cannot entirely be captured by a common market based hard law approach. Policy fields outside the core of the common market require complementary elements of new governance, as the development of gender policies and the recent Race Equality Directive have shown. A debate on the future development of anti-discrimination policy thereby needs to include both the legislative instruments available under the Community method and the coordination instrument and it needs to include it in a comparative way without stressing immediately one concept at the expense of the other (Trubek and Trubek, 2005:364). It also needs, however, a clarification on the relationship between hard and soft elements. Is obvious, the emergence of new forms of governance in the area of anti-discrimination policy needs to be treated and cannot be dismissed just because it may not fit in pre-established legal categories. However, one should not be overwhelmed by the newness and possible potentials of the coordination instrument, but needs to ground the emergence of new forms of governance on generally accepted legal principles ensuring its compatibility with the traditional legal rights-based approach as an essential element in the field of equality policies.

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Endnotes

(1) In view of secondary legislation see: Council Directive 75/117/EEC of 10 February 1975 on the approximation

of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] OJ L 45/19; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment between men and women as regards access to employment, vocational training, and working conditions, [1976] OJ L 39/40 as amended by Directive 2002/73/EC by the by the European Parliament and the Council of 23 September 2002 on the implementation of the principle of equal treatment between men and women as regards access to employment, vocational training, and working conditions, [2002] OJ L 269/15.

(2) Case 149/77, *Defrenne v SABENA*, [1978] ECR 1356; see as well: Case 14/83, *von Colson and Kamann v Land Nordrhein-Westfalen*, [1984] ECR 1891; Case 79/83, *Harz v Deutsche Tradax GmbH*, [1984] ECR 1921; Case 152/84, *Marshall v Southampton & South West Hampshire Health Authority*, [1986] ECR 723; in view of positive discrimination see: Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051; Case C-409/95, *Marshall v Land Nordrhein-Westfalen*, [1997] ECR I-6363.

(3) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between person irrespective of racial or ethnic origin, [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16; Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001-2006), [2000] OJ L 303/23; Council Directive 2004/113/EC of 13 December 2004 implementing the equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37.

(4) EU action programmes play an important supporting role for gender policies, see for example: Council Decision 2001/151/EC of 20 December 2000 establishing a programme relating to the community framework strategy on gender equality (2001-2005), [2001] OJ L 17/22, as amended by Decision 1554/2005/EC of the European Parliament and of the Council of 7.9.2005, [2005] L 255/9.

(5) Council Directive 2000/43/EC of 29.6.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

(6) The four pillars of the EES are the following ones: (1) improving employability, (2) developing entrepreneurship, (3) encouraging adaptability in businesses and their employees and (4) strengthening the policies for equal opportunities, see: Council Resolution of 15.12.1997, The 1998 Employment Guidelines, Council Resolution of 15 December 1997 on the 1998 Employment Guidelines, [1997], OJ C 30/1.

(7) Council Resolution of 22 February 1999 on the 1999 Employment Guidelines, [1998] OJ C 69/2; in view of the concept of gender mainstreaming see as well: Treaty Establishing a Constitution for Europe, [2004], OJ C 310/1: Art. III-116 until Art. III-118.

(8) European Council, Presidency Conclusions, Lisbon, 23./24. March 2000, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm , see especially par. 29, 37.

(9) Case 26/62, *Van Gend & Loos v Nederländische Finanzverwaltung*, [1963] ECR 1; Case Rs. 6/64, *Costa v ENEL*, [1964] ECR 1251; see as well Art. I-6 of the Treaty Establishing a Constitution for Europe [2004] OJ C 310/1.

(10) The EES under Art. 128 EC was subject to reforms in 2002 and 2005 transforming it into a triennial process and streamlining it and adjusting it to the coordination process under Art. 99 EC, see: Commission of the European Communities, Communication from the Commission on streamlining the annual economic and employment policy coordination cycles, COM (2002) 487 final; Commission of the European Communities, Communication to the Spring European Council: Working together for growth and job: A new start for the Lisbon Strategy, COM (2005) 24 final.

(11) European Council, Presidency Conclusions, Lisbon, 23./24.3. 2000,

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm

(12) Ibid., at par. 37.

(13) To date the OMC is applied in the following areas: social inclusion, education and training, youth policy, enterprise policy, research and technological development, sustainable development, e-Europe, migration.

(14) European Council, Presidency Conclusions, Nice, 7./8./9.December 2000, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm .

(15) Decision 50/2002/EC of the European Parliament and the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, [2002] OJ L 10/1.

(16) Similar to the EES, the social inclusion-OMC was reviewed in 2005 and changed into an overarching framework for social protection and social inclusion, see: Commission of the European Communities, Working together, Working better: A new Framework for the Open Method of Coordination of Social Protection and Inclusion Policies in the European Union, COM (2005) 706 final.

(17) Convention on the Organization for Economic Co-operation and Development (OECD), 14.12.1960, http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html.

(18) Agreement of the International Monetary Fund (IMF), 22.7.1944, <http://www.imf.org/external/pubs/ft/aa/index.htm> .

(19) The European Social Fund is one of four Structural Funds, see: Council Regulation 1260/1999/EC of 21 June 1999 laying down general provisions on the Structural Funds, [1999] OJ L 161/1.

(20) See for example the fifth Community action programme on equal opportunities: Council Decision 2001/151/EC of 20 December 2000 establishing a programme relating to the Community framework strategy on gender equality (2001-2005), [2001] OJ L 17/22; Decision 1672/2006 of the European Parliament and of the Council of 24.10.1006 establishing a Community Programme for Employment and Social Security – PROGRESS [2006] OJ L 315/1.

(21) Decision 50/2002/EC of the European Parliament and the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, [2002] OJ L 10/1.

(22) See for example the so-called “new approach” of the Commission taken as a reaction against too detailed legislative approaches.

(23) European Commission, White Paper on growth, competitiveness, and employment: The challenges and the way forward in to the 21st century 1993 COM (93) 700final.

(24) Council recommendation 92/241/EEC of 31.3.1992 on child care [1992] OJ L 123/16.

(25) The distinction between three phases of the EES is only of descriptive character and aims to structure its development: phase 1 (1997-2002); phase 2 (2002-2006); phase 3 (2005-2008).

(26) See above n. 14; European Council, Extraordinary European Council Meeting on Employment, Luxembourg, 20./21.1.1997, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00300.htm .

(27) Council Resolution of 15 December 1997 on the 1998 Employment Guidelines, [1997], OJ C 30/1; see also:

Council Resolution of 22 February 1999 on the 1999 Employment Guidelines, [1998] OJ C 69/2.

(28) Council Recommendation of 14 February 2000 on the implementation of Member States' employment policies, [2000] OJ L 52/32.

(29) According to the 2002 employment guidelines, Member States shall contribute to the objectives of: reaching an overall employment rate of 67% and an employment rate of 57% for women by 2005, reaching by 2010 an overall employment rate of 70% and an employment rate of more than 60% for women, see: Council Decision 2002/177/EC of 18 February 2002 on guidelines for Member States' employment policies for the year 2002, [2002] OJ L 60/60.

(30) The Barcelona summit agreed that Member States should provide childcare by 2010 to at least 90% between 3 and the mandatory school age and at least 33% of children under 3; see: Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of the Member States, [2003], OJ L 197/13.

(31) Gemeinsame Geschäftsordnung der Bundeministerien, decision of the federal government of 26.7.2000.

(32) Gesetz zur Gleichstellung von Frauen und Männern in der Bundesverwaltung und in den Gerichten des Bundes 30.11.2001, BGBl I 2001, 3234.; similar acts can be found on the level of the Länder, see for example: Act on Equality between Men and Women in the Public Administration of Baden-Württemberg, 11.10.2005; see further: <http://www.gender-mainstreaming.net/>.

(33) See for example: Bundesministerium für Familie, Senioren, Frauen und Jugend, Bericht über die Auswirkungen der §§ 15 und 16 Bundeserziehungsgeldgesetz, 2004.

(34) So for example the National Action Plans of the Netherlands, Spain, Ireland and Belgium.

(35) So especially the initiatives taken under the Austrian, Finish, Belgium, French and Swedish presidencies.

(36) See: European Council, Presidency Conclusions, 15./16.3.2002, Barcelona, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf , par. 49.

(37) Commission of the European Communities, Communication from the Commission on streamlining the annual economic and employment policy coordination cycles, COM (2002) 487 final, Brussels, 3.9.2002.

(38) See: Commission of the European Communities, The future of the European Employment Strategy (EES): "A strategy for full employment and jobs for all", COM (2003) 6 final, Brussels, 14.1.2002.

(39) The revised EES named ten priorities: active and preventive measures for the unemployed and the inactive, making work pay, fostering entrepreneurship to create more and better jobs, transforming undeclared work into regular employment, promoting active aging, immigration, promoting adaptability in the labour market, investment in human capital and lifelong learning, gender equality and supporting integration and combating discrimination in the labour market for people at a disadvantage; see n. 36 above.

(40) Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of the Member States, [2003] OJ L 197/13.

(41) See Art. 141 EC and: Council Directive 75/112/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] OJ L 45/19; the gender pay gap was finally included in 2002 broad economic policy guidelines (BEPG), though it is not mentioned in the later BEPGs: Council Recommendation of 21 June 2002 on the broad economic guidelines of the economic policies of the Member States and the Community, [2002] OJ L 182/1.

(42) Council of the European Union, Joint Implementation Report 2003/2004, Brussels, 5.3.2004.

(43) Council of the European Union, Joint Implementation Report 2004/2005, Brussels, 9.3.2005.

(44) European Council, Presidency Conclusions, Brussels, 22./23.3.2005, see: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/84335.pdf .

(45) Commission of the European Communities, Integrated guidelines for growth and jobs (2005-2008), COM (2005) 141 final, Brussels, 12.4.2005.

(46) See for example: National Reform Programme 2005-2008 of Germany “Innovation forcieren – Sicherheit im Wandel fördern – Deutsche Einheit vollenden“, 7.12.2005, <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/nationales-reformprogramm,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

(47) See above n. 26; see as well: Council Decision 2005/600/EC of 12 July 2005 on guidelines for the employment policies of the Member States, [2005] OJ L 205/21.

(48) Sweden belongs to the few countries having undertaken a comprehensive approach to gender mainstreaming.

(49) For more detail on the content of the pact see: European Council, Presidency Conclusions, Brussels, 18.5.2006, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/89013.pdf .

(50) Commission of the European Communities, A roadmap to equality between men and women, COM (2006) 92final, Brussels, 1.3.2006. The following six priorities are named: (1) achieving economic independence for men and women; (2) enhancing reconciliation of work, private and family life; (3) Promoting equal participation of men and women in decision-making; (4) eradicating gender-based violence and trafficking; (5) eliminating gender-stereotypes in society and (6) promoting gender equality outside the EU.

(51) See especially the progress report of Germany: National Reform Program Germany 2005-2008: Implementation and Progress Report 2006, par.12, 135.

(52) Some countries exceed the Lisbon target of 60% employment rate (Denmark, Estonia, Finland, France, Latvia, Netherlands, Portugal, Slovenia, Sweden, UK); a number of countries have significantly increased the employment have almost reached the Lisbon target (Austria, Cyprus, Germany, Ireland, Lithuania, Luxembourg).

(53) Joint Implementation Report 2005/06, More and Better Jobs: Delivering priorities of the European Employment Strategy, see: http://ec.europa.eu/employment_social/employment_strategy/employ_en.htm .

(54) See the supporting Community action programme: Decision 50/2002/EC of the European Parliament and the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to Combat Social Exclusion, [2002] OJ L10/1.

(55) European Council, Presidency Conclusions, Nice, 7./8./9.12.2000,

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm>; the European Council adopted four general objectives for the fight against poverty and social exclusion: (1) Facilitate the participation in employment, and access by all to resources rights, goods and services, (2) prevent the risk of exclusion, (3) help the most vulnerable and (4) mobilise all relevant bodies.

(56) Council of the European Union, Fight against poverty and social exclusion: Common objectives for the second round of National Action Plans, Brussels, 25.11.2002.

(57) Only Denmark, Finland, Sweden, Ireland and the UK made statutory provisions, see: Council of the European Union, Draft Joint Report on social inclusion: Part I, Brussels, 12.12.2001, p. 84.

(58) Commission of the European Communities, Working together, working better: A new framework for the

Open Method of Coordination of social protection and inclusion policies in the European Union, COM (2005) 706 final.

(59) See for example: Austria, France, Germany, Ireland Italy, Spain, UK.

(60) European Council, Presidency Conclusions, Brussels, 18.5.2006, see n. 43 above.

(61) European Council, Presidency Conclusions, Lisbon 23./24.3.2000, par. 38, see n. 11 above.

(62) Case 26/62, *Van Gend & Loos v Nederlandse Finanzverwaltung*, [1963] ECR 1; Case Rs. 6/64, *Costa v ENEL*, [1964] ECR 1251; see as well Art. I-6 of the Treaty Establishing a Constitution for Europe [2004] OJ C 310/1.

(63) European Council, Extraordinary European Council Meeting on Employment, Presidency Conclusions, Luxembourg, 20./21.11.1997.

(64) Council Decision 2003/578/EC of 22 July 2005 on guidelines of the employment policies of Member States, [2003] OJ L 197/13.

(65) The relationship could not been clarified under the Treaty Establishing a Constitution for Europe, [2004], OJ C 310/1; reference to the instruments of the coordination processes is only made indirectly in Part. III (Art. III-213 [social policy]; Art. III-250 Abs. 2 [research and technological development]; Art. III-278 Abs. 2 [health policy]; Art. III-279 Abs. 2 [industrial policy].

(66) Council Directive 2000/43/EC of 29.6.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

(67) Further examples for hybrid forms can be found in the area of environmental polity: Directive 2000/60/EC of the European Parliament and the Council of 23.10.2000 establishing a framework for Community action in the field of water policy, [2000] OJ L 327/1.

(68) See Art. 1 of Directive 2000/43/EC.

(69) Council Decision 2000/750/EC of 27.11.2000 establishing a community action programme to combat discrimination (2001 to 2006), [2000] OJ L 303/23.

(70) See for example: Council Decision 2001/151/EC of 20 December 2000 establishing a programme relating to the community framework strategy on gender equality (2001-2005), [2001] OJ L 17/22, as amended by Decision 1554/2005/EC of the European Parliament and of the Council of 7.9.2005, [2005] L 255/9; see as well: Decision 50/2002/EC of the European Parliament and the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, [2002] OJ L10/1.

(71) See: Art. 3 lit. a) as well as strand 1 of Council Decision 2000/750/EC; the latter allowed for funding of independent experts to assist the Commission in collecting data and monitoring the transposition of directives.

(72) Art. 11 and 12 of Directive 2000/43/EC.

(73) European Monitoring Centre on Racism and Xenophobia (EUMC) as established under Council Regulation 1035/199/EC, [1997] OJ L 151/1. One of its core tasks is the coordination of the European Information Network on Racism and Xenophobia (RAXEN).

(74) See Art. 17 para. 2 of Directive 2000/43/EC.

(75) Case C-27/04, Commission/Council (SGP) (unreported).

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